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UNITED STATES STATUTES

28 U.S.C. 1257(3) 2

CONSTITUTION OF TEXAS

Article I, Section 15 11

TEXAS RULES OF CIVIL PROCEDURE

Rule 166-A 2, 3, 4, 12

No._____

IN THE

Supreme Court of the United States

October Term, 1961

C. R. GOSLIN, ET AL., *Appellants*

v.

JULIA BEAZLEY, ET AL., *Appellees*

On Appeal from the Court of Civil Appeals
First Supreme Judicial District
For the State of Texas

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

Appellants appeal from the Final Judgment of the Court of Civil Appeals for the First Supreme Judicial District for the State of Texas, which affirmed the decision of the 61st Judicial District Court of Harris County, Texas, granting Summary Judgment to the Appellees. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the Appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Court of Civil Appeals, First Supreme Judicial District for the State of Texas, is reported in 339 S.W. 2d 689. The Supreme Court of the State of Texas refused the Writ of Error without opinion. A copy of the opinion of the Court of Civil Appeals is attached as Appendix "A".

JURISDICTION

The jurisdiction of this Court is invoked under *Title 28, U.S.C., Section 1257(3).* This suit was originally brought in the State Court by Appellees to try title to certain land. The Trial Court granted Summary Judgment to Appellees under authority of Rule 166-A, *Texas Rules of Civil Procedure.* Appellants perfected an Appeal to the Court of Civil Appeals, First Supreme Judicial District for the State of Texas, which rendered its decision in favor of Appellees on the 15th day of September, 1960; said decision is reported in 339 S.W. 2d 689. The Supreme Court of Texas refused Writ of Error brought by the Appellants and overruled Appellants' Motion for Rehearing on April 12, 1961. The Appellants affirmatively urged throughout the proceedings that they were constitutionally entitled to a fair hearing and a trial by jury. The nature of Appellants' constitutional attack is set out more specifically on pages 6 and 7 of Petitioners' Motion for Rehearing filed in the Supreme Court of Texas. Notice of Appeal was filed by Appellants in the Court of Civil Appeals on the 9th day of June, 1961. This Appeal is urged to review the opinion of the Court of Civil Appeals. The following decisions sustain the jurisdiction of the United States Supreme Court to review the Final Judgment in which the State Court holds a State law valid as against an attack that the law

is unconstitutionl. *Largent v. Texas*, 318 U.S. 418, 63 Sup. Ct. 667, *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 42 Sup. Ct. 106.

QUESTIONS PRESENTED

1. When the State Trial Court in its construction of Rule 166-A of the *Texas Rules of Civil Procedure* which provides for a Summary Judgment grants a Motion for Summary Judgment without disposing of the fact issues raised are the litigants deprived of their property without due process of law in violation of the 14th Amendment of the Constitution of the United States in that in the Trial Court's application of said Rule 166-A they were deprived of their fundamental right to a fair hearing and their right to present a defense to the issues raised.

2. When the people of a state in their adoption of the State Constitution declare that a trial by jury in a proper case is a fundamental and vested right and a State Trial Court in the construction of Rule 166-A denies the litigants the trial by jury when they have shown themselves qualified thereto are the litigants deprived of their property without due process of law in violation of the 14th Amendment to the Constitution of the United States thereby rendering the Court's construction of Rule 166-A unconstitutional in its application.

3. When the litigants are entitled to an Appeal by virtue of state law and the Judge who participated in the opinion is disqualified by his own Motion then are the litigants deprived of their property without due process of law and denied equal protection of the laws in violation of the 14th Amendment to the Constitution of the United States in that they did not receive a fair hearing in the Appellate Tribunal.

STATUTES INVOLVED

Rule 166-A, *Texas Rules of Civil Procedure*, reads as follows:

> (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.
>
> (b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (c) Motion and Proceedings Thereon. The motion shall be served at least ten days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
>
> (d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually

and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt. Promulgated by order of October 12, 1949, effective March 1, 1950. As amended by order of October 10, 1951, effective March 1, 1952.

STATEMENT OF THE CASE

On April 24, 1957, Appellees filed a suit in trespass to try title in the 61st Judicial District Court of Harris County, Texas, against Appellants and numerous other party Defendants for title and possession of 61.28 acres of land situated in Harris County, Texas. Appellees filed a Motion for Summary Judgment and attached thereto several Affidavits and Depositions of witnesses and parties to the suit. Appellants in resisting said motion for Summary Judgment also filed several Affidavits of witnesses and parties to the suit. After hearing the Motion for Summary Judgment the Trial Court rendered Summary Judgment against Appellants under the authority of *Rule 166-A, T.R.C.P.* Appellants thereupon perfected their Appeal to the Court of Civil Appeals. Appellees filed a Motion to Disqualify Judge Bell, the Chief Justice of the Court of Civil Appeals, and Appellants resisted said Motion on the 22nd day of April, 1960. The remaining two Justices, Justice Werlein and Justice Woodruff overruled said Motion. Thereafter Chief Justice Bell on his own Motion refused to participate in the Appellants deliberations for "personal reasons". On July 7, 1960, the Court of Civil Appeals rendered its decision affirming the Judgment of the District Court. Subsequently there was discovered that Justice Woodruff was disqualified as a matter of law thereby voiding the decision of the Court rendered on July 7, 1960. Chief Justice Bell thereupon entered the deliberations again and on September 15, 1960, Chief Justice Bell and Justice Werlein rendered the decision of the Court of Civil Appeals affirming Judgment of the Trial Court. After having the first and second motion for rehearing overruled Appellants applied for a Writ of Error to the Supreme Court of the State of Texas which was denied

without opinion other than indicating that there was no reversible error. The Supreme Court of the State of Texas overruled Appellants' Motion for Rehearing on April 12, 1961.

Appellants have urged throughout their appeal that the Trial Court was without authority to grant Summary Judgment to Appellees for the reason that Appellants during the Motion for Summary Judgment raised substantial fact issues. It is submitted to this Court that the following material issues of fact were raised.

1. When Mrs. Gaillard on cross-examination in her deposition (page 60) said "I am not claiming anybody's land by limitation, we are only claiming what my father bought from John Farmer".

2. Testimony of Fred Morris, page 26 of Morris's deposition "(speaking of Mrs. Gaillard) She told me there was some land in there she didn't claim. I don't know how much."

The Appellants urge that the Trial Court was without authority to pass upon the fact issues raised at the hearing on the Motion for Summary Judgment. The Trial Court by rendering Summary Judgment for Appellees failed to dispose of the fact issues raised. Therefore Appellants were denied a fair hearing on said fact issues.

ARGUMENT AND AUTHORITIES— QUESTION NO. 1

Appellants were first denied due process as set forth in the 14th Amendment to the Constitution when the Trial Court arbitrarily or erroneously granted Appellees' Motion for Summary Judgment thereby holding that a genuine issue of material fact had not been shown. The Judgment of the Trial Court completely ignored the following fact issues which were raised at the hearing.

1. Whether Mrs. Gaillard in her own mind intended to claim the full tract of land by limitation title or merely the tract of land which was recited in the John Farmer Deed.

2. The credibility of both Mr. Morris and Mrs. Gailllard.

Under applicable State Law the Judge in a hearing on a Motion for Summary Judgment is without authority to pass upon the fact issues raised. His only function is to determine whether a genuine issue of material fact has been shown. The Trial Court made no attempt to determine fact issues in the instant case, his Judgment merely recited that none existed. The fact issues which were raised at the hearing by Appellants, and it is now submitted that those issues were genuine issues and material to the decision in the case, have not yet been adjudicated.

Appellants are entitled as a fundamental right to access to whatever procedure that the State may have prescribed for determining fact issues. Equally fundamental is their right to determination of their issues by whatever procedure the State has prescribed. The State of Texas has delegated to the Court the judicial function of determining the law of the particular case and delegated to the jury the function of resolving fact issues of the case. It is well settled that neither the jury nor the Court may encroach upon the function of the other for within the settled concept of State due process each functions separately and independent of the other. This Court long ago recognized the fundamental principle that neither a Court nor a legislature can deny a litigant access to the prescribed State judicial procedures. It logically follows that the Court by an arbitrary and erroneous decision in its exercise of the function of determining the law cannot constitutionally deprive the respective litigants of their fundamental right of

access to the jury or whatever fact determining procedure the State may prescribe to have their facts heard and determined. Likewise when the Court construes a statute in such a manner as to deprive the litigants of their access to the designated fact finding body then such construction of the law in its application violates fundamental due process in that it deprives the litigants of a fair hearing on the issues that they have raised. The quotation by Justice Jackson in *Faye v. New York*, 332 U.S. 294, clearly illustrates the Supreme Court's role in relation to state jury procedure * * *.

> "The function of the Federal Court under the 14th Amendment in reference to state juries is not to prescribe procedures but is essentially to protect the integrity of the trial process by whatever method the state sees fit to employ."

The case which Appellants bring to this Court for adjudication is parallel in almost every respect to the case of *Saunders v. Shaw*, 244 U.S. 317, 37 Sup. Ct. 638. In the Saunders case the State Supreme Court reversed the Trial Court and entered Final Judgment for the Defendant. A Plaintiff who had never had an opportunity to introduce evidence in rebuttal to certain testimony which the Trial Court deemed immaterial but which the Appellate Court considered material was held to have been deprived of his rights without due process of law. Justice Holmes delivered the opinion of the Court * * *.

> "Probably the majority of the State Supreme Court thought that it was so plain on the uncontroverted facts that this case was within the principle of the Myles Salt Co. case that to remand it would be an empty form—a mere concession to technicality. It may turn out so but we do not see in the record an

> absolute warrant for the assumption and therefore cannot be sure that the Defendant's rights are protected without giving him a chance to put his evidence in."

The authority of this Court to review the facts on which a State Court's decision is based is well settled by this Court's decision in *Merchants National Bank of Richmond v. Richmond*, 256 U.S. 635, 41 Sup. Ct. 619, in which Judge Pitney held * * *.

> "Neither of the State Courts passed upon this evidence or made findings of fact thereon, doubtless because, under their respective views of the applicable law, the facts referred to were immaterial. But this omission does not relieve us of the duty of examining the evidence for the purpose of determining what facts reasonably might be and presumably would be—if the facts thereby shown be material."

The duty of this Court to re-examine the facts of a particular case arising from a State Court decision was specifically set forth by Judge Pitney in *P. A. Carlson v. State of Washington, ex rel Charles P. Curtiss*, 234 U.S. 103, 34 Sup. Ct. 717 (1914) when the Court held:

> "It is hardly necessary to say that that Court cannot by omitting to pass upon basic questions of fact deprive a litigant of the benefit of a Federal right any more than it could do so by making findings that were wholly without support in the evidence."

This Court has ruled numerous times that where a particular litigant is deprived of the right to present his defense or deprived of the right of a fair hearing then he has been deprived of a fundamental right in violation of the 14th Amendment to the Federal Constitution. *Hovey*

v. Elliott, 167 U.S. 409 (418), 17 Sup. Ct. 841, *Holden v. Hardy*, 169 U.S. 366 (14-15), 18 Sup. Ct. 883. The Appellants respectfully submit to this Court that a genuine issue of material fact was raised at the hearing on the Motion for Summary Judgment and that the Appellants were deprived of their fundamental right to have those fact issues determined by the prescribed state judicial procedure—a trial by jury and that the Appellants have been deprived of their property without due process of law in violation of the 14th Amendment to the Constitution of the United States.

ARGUMENT AND AUTHORITIES— QUESTION NO. 2

Walker v. Sauvinet, 92 U.S. 90, and like cases which hold that a State Court litigant is not entitled to a trial by jury have had as the basis of such holdings the proposition that a trial by jury is not a fundamental right which is protected by the 14th Amendment to the Constitution of the United States. However, a different rule must apply where under applicable state law the people of the state in which the ultimate power of government rests, have through the exercise of their plenary power adopted a certain procedure as fundamental. In Texas the people have determined that certain judicial procedures are fundamental and have deprived the judiciary and the legislature of the state of the power to infringe upon or abrogate those procedures as they were adopted by the people. The people of Texas in the adoption of Article 1, Section 15 of the Texas Constitution establishing that a right to a trial by jury shall be inviolate have pronounced as a fundamental principle that every litigant who shows himself qualified is entitled to a jury trial. The judiciary and the legislature of the State of Texas are wholly without

authority to infringe upon this right. Being fundamental, the right of trial by jury in Texas stands with equal strength next to the right of property and the right of contract. In Texas it cannot now be questioned that the right to a trial by jury is a vested right. This Court has held many times and without exception that once a right is vested then any Court in its construction and application of the statutes cannot infringe upon that vested right.

Therefore the only question before this Court on this appeal is whether a fact issue was raised at the trial level. This Court has held numerous times under identical fact situations as this case presents that a fact issue was raised and the lower Court was without authority to grant a Summary Judgment. In *Sartor v. Arkansas Natural Gas Corporation*, 321 U.S. 620, 64 Sup. Ct. 724, this Court held that the mere fact that a witness was a party to the lawsuit and interested in the outcome and results of the lawsuit within itself created genuine issues of fact and that only a jury had the authority to pass upon the credibility of the witness and the weight if any to be given to his testimony. The Court in deciding the *Sartor* case was applying its construction of Rule 56 of the Federal Rules of Procedure. It should be noted that the Supreme Court of Texas in adopting its Rules of Procedure adopted and embodied in Rule 166-A the construction that this Court had placed on Rule 56. It cannot now be denied that a genuine issue of material fact was raised in the hearing on the Motion for Summary Judgment.

By raising a fact issue, the Appellant showed himself entitled to a trial by jury. To deprive him of this right would not only be depriving him of a right which was designated as fundamental by the people of the State but would deprive the people of their federal right to a republican form of government. A republican government

undoubtedly encompasses the right of the people through their state constitutions to adopt any procedure that they may desire and designate that procedure as fundamental.

It is respectfully submitted that the right to a jury trial in Texas is a right established as fundamental by the people of the State and that a Court in its construction of a statute cannot deprive a litigant of that vested right without violating the due process guarantee embodied in the 14th Amendment of the Constitution of the United States.

ARGUMENT AND AUTHORITIES— QUESTION NO. 3

The Appellants after receiving an adverse judgment in the Trial Court perfected an appeal to the Court of Civil Appeals. At the first hearing in the Court of Civil Appeals Chief Justice Bell was challenged by Appellees in a Motion to Disqualify. The basis of the challenge was that he had formerly represented one of the Appellants in another case. The Court through Justice Woodruff and Justice Werlein overruled Appellees' Motion to Disqualify Justice Bell. Justice Bell on his own Motion did not participate "for personal reasons". The Appellants rather than seek their remedy by mandamus from the Supreme Court to have Justice Bell participate acquiesced in the Order. It should be noted by this Court that Justice Bell's own Order disqualifying himself for personal reasons has the full force and effect under state law as an Order disqualifying a Judge for cause. Under state law a Judge cannot recuse himself on his own Order except for cause. This Rule was emphatically brought out in the Court's decision in *Texas & Pacific Coal Co. v. Ready*, 198 S.W. 1034, in which the Court held the proceeding void and stated:

> "It is the right of litigants that their cases be tried before the Judge whom the people have chosen to discharge that important function. It may frequently happen to a regular Judge that for some personal reason he may not decide to try some particular case. But this gives him no right to decline to do so."

It is equally well settled throughout the United States that when a Judge disqualifies himself and both parties acquiesce in such disqualification the Judge is without authority to re-enter the case except to transfer the case to another Court, *State v. Voorhies*, 6 So. 826; *Mudge v. Hall*, 43 P. 242; *Gears v. State*, 180 N.E. 592; *Dotson v. Burchett*, 190 S.W. 2d 697. The Court of Civil Appeals rendered an adverse decision to Appellants on July 7, 1960. Justice Woodruff and Justice Werlein participated and noted that Justice Bell had disqualified himself. After the opinion was rendered it was discovered that Justice Woodruff was disqualified as a matter of law in that he was related to one of the parties in the third degree. The Court then withdrew its original opinion except that Justice Werlein and Justice Bell participated and Justice Woodruff was disqualified. It is submitted to this Court that by Justice Bell's own Order disqualifying himself, he was without authority to render the opinion of October, 1960.

The right to corrective action by an Appellate Court when a litigant has been deprived of a fair hearing in a Trial Court is a Federal right guaranteed by the 14th Amendment to the Federal Constitution, *Frank v. Mangum*, 237 U.S. 309. Moreover, when such process is made available, the corrective proceeding in the reviewing Appellate Tribunal being no less a part of the process of law than the trial proceedings, becomes subject to scrutiny on the occasion of any determination of an alleged unconstitutional deprivation of fair hearing, *Brown v. Mississippi*, 297 U.S. 278.

The right to an unbiased judge is equally well established as a Federal right which cannot be infringed upon by the State, *Tumey v. Ohio*, 273 U.S. 510. Justice Bell by disqualifying himself on his own Motion in effect established himself as not being completely unbiased. Any proceedings thereafter in which Chief Justice Bell deliberated in are void as having had a disqualified judge participate therein.

It is respectfully submitted that the 14th Amendment of the United States Constitution guarantees to each litigant a fair hearing before an unbiased tribunal at each level of judiciary proceedings that the state may establish and that a judge who is admittedly disqualified cannot thereafter participate in the proceedings without violating the constitutional rights of the litigants.

THE QUESTIONS ARE SUBSTANTIAL

The questions raised on this appeal are substantial, important and are of great public interest.

The question of access to the proper state procedure is one which this Court has reviewed many times and repeatedly held that a State Court cannot deprive a litigant of his right to have his issues determined. Whether a State Court may now do so under the guise of a Summary Judgment Statute presents a substantial question of general importance.

The question of whether a litigant is entitled to a jury trial when the people of the state have designated that right as fundamental is substantial and of great importance in that it questions the right of the people to a republican form of government, for if the people cannot establish a certain procedure as fundamental then the people are deprived of their Federal right to a republican form of government.

The question of whether a litigant is deprived of his right to a fair hearing on appeal of substantial and of great importance in that this Court has repeatedly upheld the right of a litigant to have a fair hearing before an unbiased judge in every step of state judicial proceedings.

Respectfully submitted,

Levert J. Able

I, Levert J. Able, attorney for Appellants depose and say that I have served copies of the foregoing Statement of Jurisdiction on Appellees by mailing the same by United States Mail, Certified Mail, return receipt requested to the following counsel of record in said cause.

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Houston, Texas

Levert J. Able

SUBSCRIBED AND SWORN to before me on this the 6th day of July, 1961.

J. Brunson

Notary Public in and for
Harris County, Texas

J. BRUNSON, Notary Public
In and for Harris County, Texas

APPENDIX "A"

OPINION

COURT OF CIVIL APPEALS OF TEXAS
HOUSTON

SEPT. 15, 1960

MOTION FOR REHEARING OVERRULED IN PART AND GRANTED IN PART, OCT. 20, 1960

SECOND MOTION FOR REHEARING OVERRULED NOV. 10, 1960

WERLEIN, Justice.

On July 7, 1960, this court handed down its opinion in this cause, Chief Justice Bell not participating although he sat at submission of the case. Recently, while considering motions for rehearing filed herein, it was for the first time discovered that Justice Woodruff is disqualified on this appeal because of his relationship within the third degree to one of the parties of the suit. Chief Justice Bell is not disqualified and is now participating herein, but since he did not participate in the case previously and because of Justice Woodruff's disqualification, it is ordered by the Court that said opinion of July 7, 1960 be and the same is hereby withdrawn, and the following is substituted as the opinion of the Court:

Appellees brought this suit in trespass-to-try title and for damages against Appellants and numerous other defendants. The suit involves approximately 61.28 acres of land on the San Jacinto River near its confluence with the Houston Ship Channel in Harris County. On March 24, 1958 final judgment for the land was rendered in favor

of appellees against all defendants not previously dismissed, such judgment being upon disclaimer by two defendants, by default against eight, and upon motion for summary judgment against all the rest of the defendants, including the appellants. The court also rendered judgment against appellants for $50.00 damages. The defendant, Henry White, cited by publication and who filed an answer and cross-action by his attorney ad litem, has not perfected an appeal from the judgment, and the only appellants are C. R. Goslin, Fred Morris, A. W. Bordman, A. A. LaBauve, Ben Falk and Lee Falk.

Appellant Fred Morris died May 15, 1959, and his sole heirs at law, to wit, his widow, Mrs. Winnie L. Morris, and his son, Elmer F. Morris, have filed a motion in this Court to affirm trial court's judgment. Appellants Ben Falk and Lee Falk disclaimed as to all the land except Lot 9 of the Blum Subdivision, and pled not guilty as to such tract. Appellants, Fred Morris and C. R. Goslin, pled not guilty. Appellant, A. W. Bordman, disclaimed as to all of the land except the south ½ of the south ½ of Lot 8 of said Subdivision, and an 8 acre tract out of Lot 9 of said Subdivision which he alleged he conveyed to his co-defendant, C. R. Goslin. Appellant A. A. LaBauve, disclaimed as to all the land except the north ½ of the south ½ of Lot 8 in said Subdivision, to which excepted tract he pled not guilty.

By their first three Points appellants contend that the court erred in granting the summary judgment because the evidence raises material fact issues as to the credibility of the witnesses and as to whether appellees have title by limitation.

A short resume of the testimony with respect to appellees' limitation title is necessary in order to pass upon said

Points. The evidence consists of depositions covering more than 700 pages of testimony and numerous exhibits and affidavits, in addition to the pleadings.

The evidence shows that on April 30, 1913 one John Farmer conveyed to John Beazley, Sr. "those certain tracts and parcels of land lying and being situated in Harris County and State of Texas, and being more particularly described as follows to wit: Being a part of the N. Lynch, H. R. Survey. 1st. (22½) twenty two and one half acre tract in lot No. 8, of the Blum Subdivision being the same property as described in deed from E. H. Bettis et al. to John Farmer recorded in Vol. 261 page 337. 2nd. The Hudson ten (10) acre tract out of lot No. 9 of the Blum subdivision being the same property as described in deed from P. W. Hudson to John Farmer recorded in Harris County deed records Vol 261 page 338. 3rd. The Farmer (15) fifteen acre tract, being out of lot No. (9) Nine of the Blum subdivision and being the same property as described in deed from E. H. Bettis et al. to John Farmer recorded in Harris County deed records Vol. 248 page 270" of said deed records.

Appellees, who are the Beazley heirs, have claimed the land involved in this suit as being that so conveyed to Beazley and have called it "The Farmer land." They claim that they have had possession, use and enjoyment of the land from 1913 to the latter part of 1956 through tenants, the first being Dick Tompkins, who leased the land from 1913 to 1928, and the second tenant being the appellant Morris, who leased the land from about January, 1929 to the latter part of 1956, at which time he ousted appellees from possession. Taxes were paid on the land by the Beazleys from 1914 to 1956, inclusive, with no delinquencies

except the taxes for the year 1943 which were paid when several months past due.

W. C. Lord stated in his affidavit that he had been familiar with the land involved in this suit since 1900. He and Dick Tompkins were close friends, and he knew that Tompkins had the land leased from 1900 to 1928 and regularly ran cattle thereon and kept the fences in good repair. He further testified that he passed along the south line of the property frequently for the first 30 years as the old road to the Lynchburg ferry was along that line, and that the old south fence was still standing until two or three years ago and was in the same location it had been since 1900.

D. R. Thayer, who was raised in the Lynchburg area, stated that he hunted on the land as a boy of eleven in 1923 and he continued to hunt thereon until 1939. He knew that Tompkins and Morris, at different times, had the property leased during all the time that he was familiar with it and that they ran cattle on it from 1923 to 1939. He identified the land as being the 61.28 acres of land shown on the surveyor's plat made in 1956. During all of the 16 years that he hunted on the land there were good substantial fences on the north, the east and the south sides of the property, and all kept in good enough repair to turn cattle. He found many of the old posts of such fences still standing a few days before he made his affidavit on November 27, 1957. There was never any fence on the west side of the property as the San Jacinto River served as a barrier to cattle there just as it does for all the land in that area.

W. E. Reid, who lived continuously in the Lynchburg area from 1916 to 1949 and was familiar with the property

in question, stated in his affidavit that he first became acquainted with the property when it was operated by his cousin, Dick Tompkins, who grazed cattle on it. Tompkins continued to lease it for many years and until appellant Morris became the tenant. Reid testified that he never heard of either Tompkins or Morris claiming to own any part of the land. During all the time that Reid knew the land it had a good fence, sufficient to turn cattle, on the north, east and south sides, and on the west side the San Jacinto River was used as an obstacle to turn cattle.

Robert M. Atkinson, a registered professional engineer and registered public surveyor, stated that he made a survey on the ground in the fall of 1956, and that he found an iron pipe which was the common corner of Lots 9, 8, 6 and 5 of the Blum Subdivision as set by an earlier surveyor and was able to find numerous other original markings, including an old fence on the east line of the property which had obviously been used for a great many years as he found many trees where the old wires apparently went directly through the trees or the trees encircled them, and he found a similar fence on the north line with many wires imbedded in trees. Atkinson's survey shows that the south one-half of Lot 8 included within the Beazley tract contains 20.53 acres instead of 22½ acres, as described in the Bettis deed to Farmer, and that Lot 9 contains 40.75 acres. His field notes are those used in the petition of appellees.

Hamilton Beazley, one of the appellees, stated in his affidavit that he had always understood and claimed that the deed to his father from Farmer conveyed all of the land involved in the present suit, that is, all of Lot 9, and the south 20.53 acres of Lot 8 in the Blum Subdivision, and that such land was always known to him as "the Farmer

land"; that he and the other appellees were the sole owners of the land as devisees under the will of John Beazley, Sr. and claimed the land by record and limitation title as being the land sold by John Farmer and conveyed by said deed; that all three of the fences on the south line, the east line and the north line were good 4-wire fences capable of turning cattle in 1944 when he went hunting on the property and went all over it; that in 1956 and 1957, shortly before some of the appellants tore down the old fences, he went over the property twice and found much of the old fences still standing, all of them along the same lines where they had been before.

Julia Beazley, daughter of John Beazley, Sr., who died October 8, 1914, stated in her affidavit that she and her sister, Mrs. Gaillard, took over the management of her father's estate as executrices under his will; that after her father's death in 1914 and until the end of 1928 the property involved in the suit was leased to a man named Dick Tompkins, who paid regular rent although occasonally a little late. He leased the land for grazing and ran cattle on it and at no time asserted any claim of ownership or any claim except as tenant of the Beazleys; that from the time her father purchased the land in 1913 no adverse claim of any kind or character had ever been made until a few months before the present suit was filed, when Fred Morris, Goslin, Bordman, Falk and LaBauve began to make various claims of ownership; that many times in the course of the years she had driven by the land or been there to look at it, and that since the last of 1928 or the early part of 1929 the defendant Fred Morris had leased the land, and that he never made any claim to any part of it until a few months before the suit was filed.

Julia Beazley also identified the final grazing lease agreement between her and her sister as executrices of the Beazley estate and R. V. (Dick) Tompkins covering the property. The last grazing lease to Tompkins was from January 1, 1923 to December 31, 1928, a period of five years, and provided for an annual rental of $20 in advance.

Roy D. Thayer stated in his deposition that he was all over the land between 1901 and 1914; that he moved to Scott's Bay in 1915 and back to Lynchburg in 1916; that after the hurricane in 1915 the fences were patched up, had 4 strands of wire and would turn cattle; that he didn't know much about the land after 1916; that the only thing he knew was "that was the Beazleys' that was under that fence."

Mrs. Mary Gaillard, one of the appellees, 84 years of age, testified by deposition that Tompkins was leasing the property at the time of her father's death; that she and her sister continued leasing the property to Tompkins, and that on January 1, 1929 she gave written notice to Tompkins that his lease expired on December 31, 1928 and to move his cattle as the land was being leased to another man who wished to take immediate posession. She also testified that the land was referred to in the family as "the Farmer land" because it was bought from a man named Farmer, and that they considered that land to be all of the land bought from John Farmer and that during the years 1914 to the middle of 1956 she never heard of any adverse claims being made to the land; that she was claiming the land not only for herself but for the rest of the family. her brothers and sisters, and they all owned it together.

Mrs. Galliard was then shown a receipt in which she acknowledged receipt from F. J. Morris of $25, payment in

full for pasture rent from July 15, 1928 to July 15, 1929. She testified that they took the property away from Tompkins because he was slow in making payments; that Morris continued to lease the land from 1928 or 1929 until two years ago when he quit paying rent; and that she had walked over the land with Morris in 1943 and he showed her the boundaries of the tract.

Appellant Morris, in his deposition, was not able to fix the exact date when he first leased the property, but admitted that he went into possession as a tenant of the Beazleys sometime prior to 1928 and he kept occupying the property involved in the suit, which he identified on the plat, the four corners being marked A, B, C and D, until January 1, 1937 when he signed a written lease of the property for three years, renting it from the Beazleys; that in 1946 he signed a one year lease on the property and on September 1, 1949 he signed a three year lease to such property which expired August 31, 1952; that he kept right on paying rent until about a year and a half prior to the date his deposition was taken on August 12, 1957; that he paid Mrs. Gaillard rent every year, and was not leasing the Beazley land from anyone else or paying rent to anyone else on it; that he never did tell any of the Beazleys he was claiming any part of the land and never told any of them that he did not want to be bound by the leases and was not going to be a tenant or was going to claim part of the land for himself. He stated that at the present time he was not claiming any specific part of the land involved in the suit and had never claimed any certain part of it.

He further testified that he claimed everything that the Beazley title was not good to; that on December 29, 1956 he and the defendant Goslin executed a deed con-

veying all of Lot 9 to the defendants, Lee Falk and Ben Falk, for which he got $25; that he claimed a half interest in Lot 9 because he had it under a fence all the time; that he wants what the Beazleys can't get good title to, and is claiming what the Beazleys don't claim; that if the Beazleys have title to all of the property in the suit, that is theirs because he didn't want anything that way. On the day the deposition was taken, Morris was not able to say which land that is involved in this suit he has an interest in. He said he told some people he was claiming an interest but didn't tell them what land he was claiming because he didn't know exactly where it was, and that he was just going to claim the land that was not claimed by anybody else; that all he knew was that it was under the same fence where he pastures his cattle, but he couldn't say whether it was ten acres or one acre or any specific area.

The testimony of Morris shows that the only claim he asserts is to a limitation title and that the only possession he has had of the land involved in this suit was that under leases from the Beazley heirs; and that the acreage in the pasture that Morris has had under fences including the Beazley land was approximately 150 acres.

[1, 2] The law is well settled that a summary judgment should be granted only when there is no disputed fact issue in the case. All doubts as to the existence of fact issues should be resolved against the movant. *Gulbenkian v. Penn*, 151 Tex. 412, 252 S.W. 2d 929; *Smith v. Bolin*, 153 Tex. 486, 271 S.W. 2d 93; *Murchison v. Post* Independent School District, Tex. Civ. App., 258 S.W. 2d 229, ref., n. r. e. The court is required to accept as true all evidence of the party opposing the motion for summary

judgment and give such party the benefit of every reasonable inference which properly can be drawn in his favor. *Reese v. Davitte*, Tex. Civ. App., 255 S.W. 2d 1015, eror dism.

[3] In applying the law as laid down in the foregoing cases, we have concluded that appellants have wholly failed to raise any fact issue with respect to appellees' adverse possession and limitation title to the tract of land in question. The uncontroverted affidavits and undisputed testimony of appellees' witnesses in their depositions, together with the admissions and testimony of Morris in his deposition, clearly show that appellees have as a matter of law acquired a good limitation title to all of the property sued for.

[4] Appellants contend, however, that there are conflicts in the evidence with respect to appellees' limitation claim since the maps introduced in evidence are conflicting as to the quantity of land in the south ½ of Lot 8 and in Lot 9. The map of 1871 recorded in Vol. 9-A, page 492, Harris County Deed Records, shows that the south ½ of Lot 8 contains 17 acres, and that Lot 9 contains 30½ acres. The map attached to the deposition of appellant, Fred Morris, made by surveyor Atkinson in November, 1956 describes the south ½ of Lot 8 as 20.53 acres and Lot 9 as 40.75 acres; whereas, the map attached to the deposition of appellees' witness, Frank West, shows that the tract of land consisting of ½ of Lot 8 and Lot 9 contains a total of 55.68 acres.

We do not think the differences in acreage shown on said maps, made at different times and by different surveyors, raise any material fact issue insofar as appellees' limitation title is concerned. The testimony is clear and

definite that their claim extends to and includes the south ½ of Lot 8 and Lot 9 regardless of the exact acreage contained therein. They identified the tract as the land which they claimed under the Farmer deed by both record and limitation title, having the boundary lines which Morris had pointed out to Mrs. Gaillard, and with the four corners of the tract marked A, B, C and D on the map introduced in evidence and attached to the Morris deposition, such tract containing in all, according to the survey of Atkinson, 61.28 acres.

The other conflict asserted by appellants allegedly appears in the testimony of Mrs. Gaillard. On cross-examination she testified:

> "Q. But you are not claiming any land that you might have had by limitation; you are just claiming the land that you bought from the Farmers—I mean that your father purchased from John Farmer? A. I am not claiming anybody's land by limitation. We are claiming just what we bought."

Appellants rely on *Warren v. Fredericks*, 1892, 83 Tex. 380, 18 S.W. 750, and on *Nerio v. Christen*, Tex. Civ. App., 189 S.W. 1038, 1040, in which latter case it is stated, with respect to testimony showing that one held land in subordination to the real title "* * * and when the admission is made by the possessor upon the witness stand in the very case in which he assumes the burden of showing adverse possession, it should be received as much more conclusive than when made under other circumstances."

Appellants also rely upon *Kirby Lumber Company v. Conn*, 114 Tex. 104, 263 S.W. 902, 903, in which it is stated:

> "Yet, without intent to claim land as his own, no matter how groundless the claim, the possessor can never acquire a limitation title thereto."

They also cite *Houston Oil Company of Texas v. Jones*, 109 Tex. 89, 198 S.W. 290; *Stanolind Oil & Gas Co. v. State*, 136 Tex. 5, 145 S.W. 2d 569.

The foregoing cases cited by appellants hold in effect that recognition by the limitation claimant of the true owner's title, made at any time prior to the maturing of the limitation title, is fatal to the limitation claim; but if made after the maturing of the limitation title, such recognition, if it constitutes a definite admission of no adverse claim, may raise a fact issue as to whether such claimant in fact during the limitation period relied upon, intended to claim adversely to the true owner.

In her testimony Mrs. Gaillard did not recognize title to the land in anyone else, nor did she at any time admit that the Beazley heirs were not claiming the limitation title pleaded by them. If any inference might have been drawn from the foregoing statement that she was not claiming the land in question by limitation title, it was immediately dispelled by Mrs. Gaillard's testimony in the same deposition and at the same sitting when she testified that she did not make or intend to make any such statement. Previous to such cross-examination she had testified, in referring to the plat, that she made claim to the land shown thereon as Lot 9 and the south 20.53 acres of Lot 8, and that she always understood that "we owned it. We didn't claim it. We owned it." She was asked whether she claimed to own just part of it or all of it, and she answered, "All of it."

[5] On redirect-examination, she testified that it was never her intention to waive any right or give up any right which she may have to any of the land within the four corners marked A, B, C and D of Plaintiffs' Exhibit No. 1, and that she was claiming all of the land by any character of title that she had. We think the testimony of this elderly woman is clear to the effect that she was claiming the land in question as the land which her father bought from Farmer, and she was claiming all of the land enclosed in the fences across the years as being such land, and she never meant to say anything to the contrary. The fact that she may have been mistaken in believing that the entire tract was included in the Farmer deed, would not deprive her possession of its hostile character. See 2 Tex. Jur. 2d, p. 190, § 91, and authorities cited.

There is no analogy between the facts in the present case and the facts in such cases as *Nerio v. Christen*, supra, upon which appellants heavily rely. In that case when demand was made upon the limitation claimant he surrendered possession of the property, removed his fence and delivered part of his crop. When interrogated by the court, he stated that he went upon the land thinking that if anyone should claim it he would pay rent for it, and he repeated the statement that the year of the trial was when he first claimed to own the land. We shall not undertake to analyze the other cases cited. Suffice it to say they are quite distinguishable from the instant case, in which appellees claimed the land within the fences as the Farmer land, used it, enjoyed it, and received rents from leasing it for a period of more than forty years.

In *Bruce v. Washington*, 80 Tex. 368, 15 S.W. 1104, 1105, the defendant stated on cross-examination that he "never intended to claim any land but what he bought, and never

intended to get any of plaintiff's (Mr. Bruce's) land by limitation." Although such statement, unlike that of Mrs. Gaillard, was a definite statement that the defendant never intended to claim any of the plaintiff's land by limitation, the court said the defendant's possession was an actual and visible appropriation of the land, commenced and continued under a claim of right wholly inconsistent with Bruce's and hostile to any claim he had. The court also stated:

> "The legal effect of the existence of these facts cannot be destroyed or impaired by the mere declaration of the defendants, after the right attaches by virtue of the law, that they were not claiming plaintiff's land by limitation. The statute has given to the adverse, continuous, hostile possession, shown by the proof in this case, a certain effect. It results in the consummation of a title.—a title as full and absolute as any other perfect title. Such title is the owner then deemed to hold preclusive of all claims; and it is not to be affected by a subsequent statement to the effect above mentioned."

See also Louisiana & Texas Lumber Co. v. Stewart, Tex. Civ. App., 148 S.W. 1193, to the same effect.

[6] In view of all of Mrs. Gaillard's testimony and her very clear and succinct statements as to what she was claiming for herself and her brothers and sisters, we do not think that the single statement made by her, referred to by appellants, which she almost immediately said she did not make or at least did not mean to make, could give rise to any genuine fact issue. The whole tenor of her testimony definitely shows that she was always claiming all of the land in this suit by both record and limitation title.

Appellants, by their next group of points, assert in substance that there are defects in appellees' record title, and that the deeds introduced in evidence by appellees do not sufficiently describe the property sued for.

[7] We do not think it necessary to discuss the alleged irregularities in appellees' record title insofar as the claims of Goslin, Morris and the Falks are concerned. Appellant Morris testified in his deposition that his only claim to any title was by limitation, and certainly being the tenant of the Beazleys he could not claim adverse possession as against their possession nor contest their title without connecting up with some outstanding title, which he never did. Appellants Goslin and the Falks are in no better position than Morris to contest appellees' title since they hold under him and took possession of the property by his permission. Houk v. Kirby Petroleum Co., Tex. Com. App. 1930, 65 S.W. 2d 496; Benskin v. Barksdale, Tex. Com. App. 1923, 246 S.W. 360.

In Tyler v. Davis, 61 Tex. 674, our Supreme Court stated in a trespass-to-try title suit:

> "In this suit the landlord seeks to recover from his tenant, who is holding over after the expiration of the lease, and refuses to surrender possession. To sustain his action he has introduced no other proof except the lease and the value of the use and occupation. * * *
>
> "That, as a general rule, a tenant cannot dispute his landlord's title is well established and universally admitted, and neither citation of authority, nor discussion of the principle upon which it rests, is at all necessary, since it has been recognized at law for so great a length of time. * * * Whilst the plaintiff must go back to the government or to a common source in other cases, yet as to one estopped to deny his title, it is enough that he establishes the facts upon which the estoppel is supported. * * *

> "The plaintiff is not required to show in the first instance a good title in himself, and the defendant cannot succeed by reason of an outstanding title with which he has no connection."

To the same effect see Henninger v. Pickren, Tex. Civ. App., 295 S.W. 264, writ dism.; King v. Maxey, Tex. Civ. App., 28 S.W. 401; Pynes v. Dodd, Tex. Civ. App., 121 S.W. 2d 1045, writ ref.

In McKie v. Anderson, 78 Tex. 207, 14 S.W. 576, 577, relied on by appellants, the court stated: "When plaintiff proved that the defendant had attorned to him, and had not subsequently surrendered the possession, we think it then became incumbent upon the defendant to prove a superior title with which he was connected, in order to defeat plaintiff's recovery."

[8] Even if Morris had been actively asserting title to a specific tract of land, he lost any rights he may have acquired during his tenancy by signing the written leases on January 1, 1937, October, 1946 and September 1, 1949. The signing of the leases and the acceptance of the tenancy relationship terminated any claim of limitation title he mght have had.

[9] It is true that at numerous places in his deposition Morris testified that Mrs. Gaillard told him to claim some of the land in the general enclosure which he had fenced, which included lands of other persons and approximately 150 acres. Mrs. Gaillard vehemently denied making any such statements. But on this appeal we are bound to accept Morris' story as true. It will be found, however, that each statement that Morris made wholly fails to point out any particular land that Mrs. Gaillard said Morris could claim and wholly fails to say that he could claim any of the land involved in this suit. The most that can be said for the

statements Morris attributes to Mrs. Gaillard is that they referred to land in the 150 acre pasture which she did not claim.

[10] Moreover, Morris repeatedly states throughout his deposition that he cannot put his finger on one acre of this land or any particular tract that he has been claiming or that he now claims. He has simply been claiming whatever the Beazleys did not claim or own. Certainly, under these facts there can be no actual and visible appropriation of land since the claimant is not asserting a right to any particular tract. Mhoon v. Cain, 77 Tex. 316, 14 S.W. 24; Forsod v. Golson, 77 Tex. 666, 14 S.W. 232.

In Wiess v. Goodhue, 46 Tex. Civ. App., 142, 102 S.W. 793, 797, this Court stated:

> "If the claimant in fact claims it against the world, the statute is set in motion. If he merely claims it tentatively, subsect to the result of inquiry as to whether it is within his boundaries, the claim is not adverse."

In Rick v. Grubbs, 147 Tex. 267, 214 S.W. 2d 925, 927, our Supreme Court quoted with approval from 2 C.J.S. Adverse Possession § 48, p. 566, as follows:

> "To be effective as a means of acquiring title, the possession of an adverse claimant must be exclusive of the true owner. The owner must be wholly excluded from possession by claimant."

See also Riddle v. Vandiver, Tex. Civ. App., 225 S.W. 2d 460; Vela v. Hester, Tex. Civ. App., 280 S.W. 2d 369, ref. n.r.e.; Richey v. Miller, 142 Tex. 274, 177 S.W. 2d 255, 170 A.L.R. 832; Wiley v. Bargman, Tex. Civ. App., 90 S.W. 1116; Hicks v. Southwestern Settlement &

Development Corp., Tex. Civ. App., 214 S.W. 2d 315, 316, ref., n.r.e.

In the latter case the court stated:

> "Plaintiffs' proof did not fix either the location or the boundaries of Thomas Collier's actual possession with the certainty required to support a judgment for the land held in such possession, and under Plaintiffs' pleading, the trial court properly instructed a verdict in Defendants's behalf unless this proof exhibited a prima facie title to the entire league, vested in Thomas Collier."

[11] Morris testified that he never repudiated the tenancy and never told the Beazleys he was claiming any part of their land. He could make no adverse claim to the land without giving notice to the Beazleys that he was doing so. In this case we think actual notice rather than mere constructive notice was required since the landlord and tenant were frequently in contact with each other. Brown v. Bickford, Tex. Civ. App., 237 S.W. 2d 763, ref., n.r.e. See also Woodley v. Hughes, Tex. Civ. App., 252 S.W. 2d 997; Park v. Sweeten, Tex. Civ. App., 270 S.W. 2d 687, affirmed 154 Tex. 266, 276 S.W. 2d 794.

Appellants assert that the court erred in admitting the Morris leases in evidence insofar as appellants Bordman and LaBauve are concerned since they do not hold the south ½ of Lot 8 under Morris, but claim to hold the same under the Christian heirs.

Bordman and LaBauve are in the same position in regard to their alleged title and contentions. With respect to whether they were let into possession of the south ½ of Lot 8 by Morris, Bordman testified by deposition when asked how he got in to see the land, that he went to Morris

who brought a key and unlocked a lock on the gate and let him in there and that it was through Morris he got in and out of the property. He also testified, however, that he didn't see how Mr. Morris actually put him in possession of the property since Morris didn't do more than show him the property and open the gate, and Morris wasn't claiming the land.

In view of our holding that appellees have perfected a good limitation title to all of the property in question, we find it unnecessary to determine whether Bordman and LaBauve are estopped to deny appellees' title to the south ½ of Lot 8 because of connection with the Morris tenancy, or to decide whether appellants or appellees have connected with the common source of title.

[12] There is no merit in appellants' contention that the court erred in considering the written leases introduced by appellees because the same were not included in their abstract of title. The three written leases executed by Morris during his 27 years as appellees' tenant are attached to his deposition. No motion was made to strike such leases or Morris' testimony in his deposition concerning them. It is our opinion that the leases were admissible in evidence although not included in appellees' abstract of title, since they are not instruments by which appellees obtained title but merely constitute acknowledgments of tenancy showing the relationship of the parties. Barrera v. Duval County Ranch Company, Tex. Civ. App., 135 S.W. 2d 518, 520, writ ref., is decisive of the question. The court stated:

> "The tenancy agreements were admissible to refute appellant's claim of title by limitation and were not required to be included in appellee's abstract of title. Davis v. Cisneros, Tex. Civ. App., 220 S.W. 298; Wolf v. Wilhelm, Tex. Civ. App., 146 S.W. 216."

Appellants next assert that the leases were void for want of description of the land leased. This contention is untenable since appellees are not claiming that they acquired any title under the leases which described the land as "approximately 50 acres on the San Jacinto River purchased by John Beazley, Sr. from John Farmer." They introduced the leases merely to show that Morris had repeatedly acknowledged that he was holding possession of the property as a tenant of the Beazleys. There is a great deal of evidence in the record clearly identifying the land leased. During all of the period from 1928 to 1956 Morris not only acknowledged his tenancy but he paid rent to the Beazleys on the land in controversy. We have hereinabove discussed the other matters argued by appellants under this Point.

[13] We do not agree with appellants' final contention that there is no evidence to sustain the court's judgment for $50 damages. The annual rental of the property paid across the years was $20 or more, and the undisputed evidence indicates that the value of the land was in excess of $1,000 per acre.

[14] Appellees' counter-assignment of error with respect to retaxing costs is in part overruled and in part sustained. Under the authority of Bruni v. Vidaurri, 140 Tex. 138, 166 S.W. 2d 81, it was proper for the Court to tax against appellees, under the facts of this case, the compensation allowed the attorney ad litem appointed to represent the defendants cited by publication. We agree with appellees' contention that the Court erred in taxing any of the other costs against them. See Rules 131 and 141, Texas Rules of Civil Procedure. No good cause is stated on the record for adjudging the costs as was done. See also J. I. Case Threshing Mach. Co. v. Manes, Tex. Com. App.

1923, 254 S.W. 929; Page v. Key, Tex. Civ. App. 1943, 175 S.W. 2d 443, ref. w.o.m.

The judgment of the Trial Court is reformed by taxing the costs in the Trial Court against appellants, with the exception of the $1,500 attorney's fee allowed the attorney ad litem which is taxed against appellees; and, as reformed, it is affirmed.

Reformed and affirmed.

WOODRUFF, J., disqualified and not participating.

On Motions for Rehearing

WERLEIN, Justice.

[15] Appellants in their motion for rehearing have called to our attention for the first time the fact that appellees did not object or except to the trial court's judgment with respect to the adjudication and taxing of costs in the trial court. Appellees, having failed to object in the trial court, may not raise such question for the first time upon appeal. Carmichael v. Williams, Tex. Civ. App., 268 S.W. 502, writ dism., w. o. j. Appellees' contention that the erroneous adjudication of costs by the trial court constitutes fundamental error is without merit. Their contention that by attaching to their motion for summary judgment a suggested form of decree in which costs were otherwise taxed they thereby directed the court's attention to their position and registered their objection to the court's decree in taxing costs, is also without merit. The suggested form of judgment attached to the motion for summary judgment was not in proper form nor was it considered, signed or acted upon by the trial court in any way insofar as the record indicates. No objection was made to the court's

action in not entering it and entering the judgment as was done. Appellees' counter-assignment of error with respect to retaxing costs is overruled, and the judgment of the trial court is in all things affirmed.

The motion for rehearing of Henry White, and appellees' motion for rehearing with respect to retaxing costs, and appellants' motion for rehearing, except as to taxing costs, are overruled.

On Second Motions for Rehearing

[16] Appellants, by their second motion for rehearing, asserts that this Court erred in rendering its opinion and judgment of October 20, 1960 for the reason that Chief Justice Bell and Associate Justice Woodruff are disqualified to sit in this case. As stated in our opinion of September 15, 1960, Associate Justice Woodruff is disqualified, but Chief Justice Bell is not disqualified although he did not for personal reasons participate in the opinion handed down herein on July 7, 1960. The motion filed by appellees praying that Chief Justice Bell recuse himself as bein disqualified is again refused. It was refused by this Court on April 30, 1959 when Chief Justice Bell, although not disqualified, on his own motion recused himself from participating in the case. After Associate Justice Woodruff's disqualification came to the attention of the Court, Chief Justice Bell decided to fully participate herein notwithstanding his former intention not to do so.

Appellants' and Henry White's second motions for rehearing are overruled.

WOODRUFF, J., not participating.

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No. 215

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

C. R. GOSLIN ET AL., *Appellants*,

vs.

JULIA BEAZLEY ET AL., *Appellees*.

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS.

APPELLEES' STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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REASONS FOR DISMISSING OR AFFIRMING.

The appellees show the court that this appeal should be dismissed (or, at all events, that the same should be affirmed) for the following reasons: (1) The questions now presented to this court were not affirmatively urged or presented to the state court. (2) No substantial federal question is raised.

I. Appellants Did Not Assign These Alleged Errors in the State Court.

At page two of appellants' brief the statement is made that they affirmatively urged throughout the proceedings that they were constitutionally entitled to a trial by jury and that the nature of their constitutional attack is more specifically shown on pages six and seven of their motion for rehearing filed in the Supreme Court of Texas (Item 25, Transcript).

A search of the record reveals that appellants never presented the three questions now urged as constitutional questions in either the Supreme Court of Texas or the Court of Civil Appeals for the First Supreme Judicial District. Pages six and seven of their motion for rehearing in the Supreme Court of Texas show that they stressed only one specific constitutional provision, Article 1 of Section 15 of the Constitution of Texas. No reference whatever is made to the Constitution of the United States except to say that the right to trial by jury is "further guaranteed by the Bill of Rights in our United States Constitution" (page 6) and to say that the framers of the state and federal constitutions were prudent men and were very careful to see that the right to trial by jury should never be denied (page 7).

The appellants had many opportunities to urge the constitutional questions now presented by their first and second questions. Their points of error in their brief in the Court of Civil Appeals (pages 1 to 4, Item 27, Transcript) are barren of any point on these questions. Their motions for rehearing which they filed in the Court of Civil Appeals (Items 20 and 21, Transcript) are without any assignment of error upon which they can predicate any of their three questions. The motion for rehearing in the Court

of Civil Appeals, appearing as Item 21 of the Transcript, does say that the voluntary recusation of the Chief Justice violated a provision of the Texas Constitution, but it does not even mention the Constitution of the United States.

The application for writ of error in the Supreme Court of Texas (Item 26, Transcript) and the motion for rehearing in that court (Item 25, Transcript) affirmatively reveal that the three questions now presented were never presented as questions involving the Constitution of the United States.

It is elementary that the specific provision of the Constitution upon which the appellant wishes to rely must be called to the state court's attention, *Herndon* v. *Georgia*, 295 U.S. 441, 79 L. Ed. 1530, 55 S. Ct. 794.

II. Questions Nos. 1 and 2 Present No Federal Question.

Basically the complaint presented in the first two questions by the appellants is that Rule 166-A of the Texas Rules of Civil Procedure violates the due process clause of the Fourteenth Amendment. But Rule 166-A is an almost exact copy of Rule 56 of the Federal Rules of Civil Procedure.

It is submitted that it is no longer an open question in this court as to whether Rule 56 is constitutional.

III. Question No. 3 Does Not Submit a Substantial Federal Question.

The facts must be stated more clearly than they have been set forth by the appellants. The appellees moved that the Chief Justice recuse himself as disqualified because he had represented the appellant C. R. Goslin in a suit which was brought for Goslin's disbarment (Item 14, Transcript).

The appellants vigorously opposed this motion and insisted that the Chief Justice was not disqualified (Item 15, Transcript). The Court of Civil Appeals overruled the appellees' motion requesting the Chief Justice to recuse himself as disqualified for the reason that he was not disqualified, but on his own motion the Chief Justice recused himself from further participation (Item 16, Transcript). Thereafter, as shown by the opinion of the Court of Civil Appeals, the Chief Justice removed his own recusation and sat in the case. No complaint was made by the appellants in their motion for rehearing filed after the opinion was delivered (Item 20, Transcript). It was almost a month later that the appellants first complained that the Chief Justice had sat in the case (Item 21, Transcript).

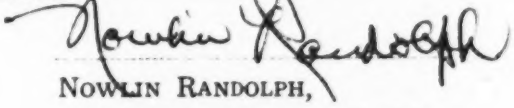
Appellants are thus placed in the remarkable position of contending that the Chief Justice is disqualified because he, the Chief Justice, at one time represented the appellant Goslin in other litigation.

Reference is made to a case cited but not discussed by the appellants, *Dotson* v. *Burchett*, 301 Ky. 28, 190 S.W.2d 697, for a full review of the authorities. That discussion shows clearly that erroneous recusation may later be set aside by the judge who took the prior action.

Since the prior representation of the appellant Goslin was in a different case from that now before the court, the Chief Justice was not disqualified 72 A.L.R.2d 467; *Roberson* v. *U. S.*, 249 F.2d 737, 74 A.L.R.2d 434; *Ex Parte Largent*, 162 S.W.2d 419; *Blackwell* v. *Farmers & Merchants National Bank*, 76 S.W. 454; same case, 97 Tex. 445, 79 S.W. 518.

CONCLUSION.

It is respectfully submitted that the grounds of jurisdiction do not exist and that no substantial federal questions are shown and that the appeal should be dismissed or, if for any reason that action is not deemed proper, that the cause should be affirmed.



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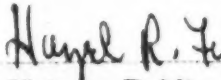
I certify that I have served upon Levert J. Able, Esq., attorney for the appellants, a copy of the foregoing statement opposing jurisdiction and motion to dismiss or affirm by mailing the same by certified mail to him at 11th Floor, 711 Main Building, Houston 2, Texas.

NOWLIN RANDOLPH.

Sworn to and subscribed before me on this the 25th day of July, 1961.



Notary Public in and for
Harris County, Texas.